

**An Analysis of the Navy's
Alternative Disputes Resolution Program**

**By
Kreg R. Everleth**

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I would like to dedicate this to my Mom and Dad for all the love and support they have given me over the years.

To Krissy, Sidney, and Gilbert, thank you for understanding and being there for me.

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1. EXECUTIVE SUMMARY

Everyday of our lives we enter into some sort of contract. We promise to give something in order to receive something in return. There are several factors that must be satisfied in order for the contract to be enforceable in a court of law. Smith, Currie, & Hancock's "Common Sense Construction Law," states there must be five of these factors. They are:

1. There must be a meeting of the minds.
2. The subject matter must be lawful.
3. There must be sufficient consideration.
4. The parties must have the legal capacity to contract, and
5. There must be compliance with legal requirements regarding the form of the contract; for example, some contracts must be in writing (37).

If all of the above factors are met and there is a disagreement between the parties, then the contract must be interpreted as a whole document. This is due to the fact that certain sections of the contract may override or reinforce other parts of the document (Smith et al, 39). As a result of the complexity of contracts and the

construction of the projects, these disagreements can range from the owner changing the scope of the project; differing site conditions at the project site; delays caused by owner, weather, or strikes; and payment for the work that has been performed. Because of these problems, the contractor might have the right to extra time and/or money. According to Jimmie Hinze's "Construction Contracts," "Once a contract has been written, issues arise which the parties to the agreement cannot satisfactorily resolve between themselves. A common means of resolving such disputes is through formal litigation in which a court decision is made which is binding on both parties (19)."

Litigation is the formal process of using the court system to have your dispute resolved. However, contracting authorities are moving towards using ADR - Alternative Disputes Resolution. What this means is finding another way of settling the dispute to avoid litigation and all the cost and time associated with it. Why is ADR becoming more popular? Owners and contractors alike want quicker means of resolving their disputes in a more timely manner. The litigation process has a very long discovery process or finding of facts that are exchanged with the other party. This could take up several months or longer depending on

the complexity of the case. ADR provides a more flexible means for the parties to resolve their problems. It uses the most critical facts that relate to the case. Also, the rules of evidence are not strictly followed as in a court case. This means certain facts or documents could be used in ADR that otherwise would not be allowed in a court of law. An important aspect of ADR is the outcome of the decision is kept private and confidential to both parties (Powell 1). ADR is especially useful if there is no question of the law; otherwise it is paramount that the dispute be resolved through the court system. This will establish future precedence in case law.

The Navy has been processing its claims according to the Contract Disputes Act of 1978. This act states that a contractor has the right to submit a claim to the contracting authority for a Contracting Officer's Final Decision (COFD). If the contractor does not agree with the COFD, then the claim can be appealed to either the Armed Services Board of Contract Appeals (ASBCA) within 90 days or to the Court of Federal Claims (CFC) within one year.

With the recent passage of legislation and federal policies, the contracting authorities have the option of

using ADR to solve their disputes. There is no set way of using ADR because it has many different styles and is tailored made per the situation. The most popular type of ADR is the one that involves a third party neutral. This is someone who is a recognized expert in the construction and contracting field who will listen and help both parties come to an agreement. The third party neutral can use mediation, mini trial, disputes review board or arbitration to solve the dispute. He has the flexibility to use the method that most fits the situation to help both parties come to an agreement (McElhenny 1).

The Navy has seen a recent decline in the number of claims that have been levied against them. There is no one reason for this, but many. The way the field offices are doing business in the area of "contract avoidance" is a method of trying to resolve the issues before it becomes a claim. This form of ADR is the one that everyone should be using. It saves time of litigation and money.

This paper is going to focus on the legislation and policies that govern the Navy's Alternative Disputes Resolution program and the different types of ADR's it uses. In addition, it will analyze the trends of Southern

Division, Naval Facilities Engineering Command (SouthDiv)
and Naval Facilities Engineering Command (NAVFAC) as a
whole on their use of ADR.

2. LEGISLATION

The Congress of the United States has the authority of making laws. This section outlines some of the major legislation the Congress has passed in the area of contracting claims and disputes.

2.1 Contract Disputes Act

The United States Congress passed the Contract Disputes Act (CDA) in 1978, detailing the procedures for contractors to submit a claim against the government. These procedures start at the time the contractor submits the claim until the final decision and payment is made. It also outlines the appeal process to either the Court of Federal Claims (CFC) or to the Armed Service Board of Contract Appeals (ASBCA).

The CDA states "all claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision" (qtd in Smith et al. 383). This written submission to the contracting officer also must be certified if the claim amount is for more than \$100,000. Once the contracting officer receives the claim, he/she has

up to sixty (60) days to make a decision in either for or against the contractor. After the decision, the contractor can accept the decision making it binding, or make an appeal. The appeal can be made to either the ASBCA within ninety (90) days after the decision or to the CFC within twelve (12) months of the decision. Whichever one the contractor chooses, he can not at a later date switch to the other one (Smith et al. 407). Figure 1 details the dispute process.

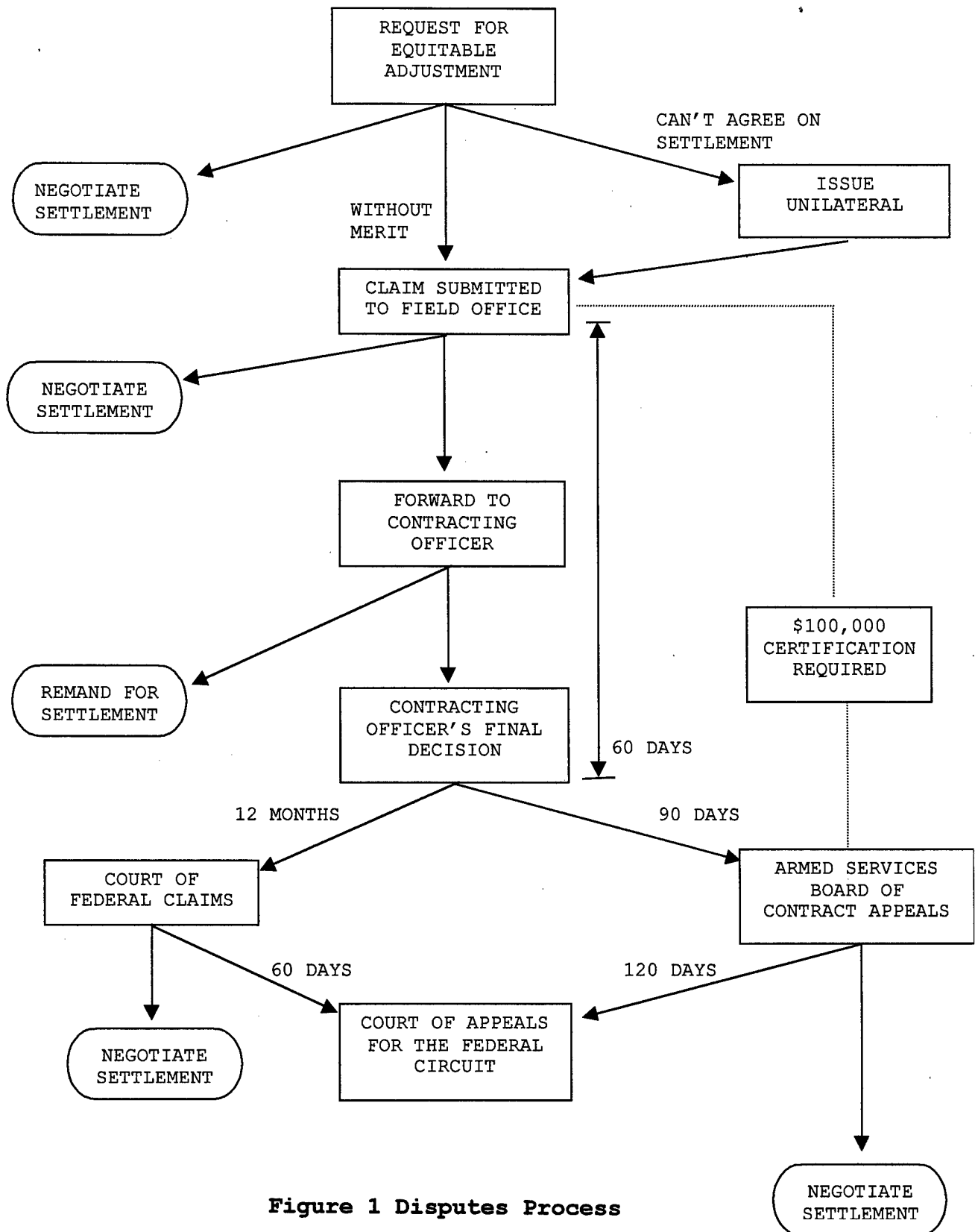


Figure 1 Disputes Process

There are several factors that a contractor must take into consideration in choosing either ABSCA or CFC. These are outlined in Smith, Currie & Hancock's "Common Sense Construction Law". They are:

1. Time and Money. Normally less expensive and quicker to use the board than courts hearings.
2. Judicial Background Experience. Board judges must have five years experience with government contract law.
3. Case Issues. To see how the court or board will view certain issues, especially if they have heard cases with similar disputes.
4. Agency Involvement. If the case goes to the board, then the agency can use its own trial counsel. If it goes to the court, then the Department of Justice has the jurisdiction of counsel.
5. Hearing/Trial Location. Both are located in Washington, DC, however there are circumstances that they might be held closer to the parties.
6. Counsel's Involvement. In the court a practicing attorney for the contractor must be used. In the

board, any officer of the contractor can be the representative (410).

The CDA has provisions for the ASBCA to use to its full potential other means to solve the disputes. These procedures are given in the "ASBCA - Notice Regarding Alternative Methods of Disputes Resolution" which will be discussed in a later chapter.

2.2 Administrative Disputes Resolution Act of 1990/1996

The United States Congress passed the Administrative Disputes Resolution Act (ADRA) in 1990. The Act was due to expire in 1996 when the Congress permanently signed it into law. This act enables any federal agency to use ADR to resolve its disputes. Senator Carl Levin, (Democrat - Michigan) summed up the main reason why this act was passed during senate hearings. He stated:

"It is a fact of life that any many people have disputes with the Federal Government. In the late 1980's, of the 220,000 civil cases filed in Federal Court, more than 55,000 involved the Federal Government in one way or another. Resolving these disputes cost taxpayers billions of dollars. Resolving them before they become courtroom dramas is one way to make a dent in this billion-dollar drain on taxpayer funds. Mediation, arbitration, mini-

trials, and other methods offer cheaper, faster alternatives to courtroom battles (DAU K-38)."

This is a very appropriate statement. When a dispute is solved through the court system, it bogs and slows down the decision making process and the costs escalate.

The ADRA detailed several requirements Federal agencies had to establish. Each agency has to come up with policies outlining how it was going to use ADR to solve their disputes. They have to designate a senior agency official to be their Disputes Resolution Specialist (DRS). The specialist's duties include the training of its agencies personnel in the proper use of ADR, to set up policies and standard operating procedures for ADR, and to review current contract clauses to determine if it is necessary to amend them to promote the use of ADR to solve disputes.

The 1996 version of ADRA included several new provisions. First it re-authorized the act, permanently making it law. Second, it deleted the definition of settlement negotiations as a means of ADR. Third, it authorized the use of Binding Arbitration as a means of ADR.

And fourth, the certification of the claim was raised from \$50,000 to \$100,000 to coincide with the Contracts Disputes Act (DON-OGC 1).

3. POLICIES

To analyze the Navy's Alternative Disputes Resolution (ADR) Program, we need to first understand the policies and regulations that have been established. The President of the United States has established these policies in the form of Executive Orders, further refined through the different echelons of command down to the field offices. This section will look at how each agency interprets these orders and adapts it for their specific use.

3.1 Executive Order #12979

The President of the United States, William J. Clinton, signed Executive Order #12979 "Agency Procurement Protests" on October 25, 1995. This order deals with protests that arise with the award of a government contract. It prescribes that agencies try and settle the protest at the contracting officer level by using ADR techniques, such as third party neutrals. Contractors can appeal the contracting officer's decision on the protest to the next higher level if they feel that the contracting officer has violated a regulation or statute. While the protest is being heard, the award of the contract will be held up

until a final decision is made. However, if there are urgent or compelling reasons, the government could award the contract if it finds that it is in the best interest of the United States.

3.2 Executive Order #12988

The President signed Executive Order #12988, "Civil Justice Reform," on February 5, 1996. This order requires agencies to move as quickly and efficiently as possible to resolve the dispute or claim through the informal means of ADR, (mediation, negotiations, arbitration, etc) before it has to go through the court process. This will help encourage both the government and contractor to use ADR to expedite the claims process, thus saving both parties time and money.

3.3 Memorandum to the Heads of the Executive Departments and Agencies

On May 1, 1998, the President released a memorandum to the Heads of the Executive Departments and Agencies encouraging the use of alternative means to solve problems. This memo authorizes the agencies to designate a representative to the Alternative Disputes Resolution Working Group.

This working group will:

1. Develop programs that employ alternative means of dispute resolution.
2. Train agency personnel on when and how to use alternative means.
3. Develop procedures that permit agencies to obtain the services of neutrals on an expedited basis.
4. Keep records to ascertain the benefits of the alternative means (White House Memo 1).

The goal of the working group is to promote agencies to use ADR wherever possible and to help streamline the process to make it fair and equitable for all parties.

3.4 Department of Defense Directive 5145.5

Department of Defense Directive (DODD) 5145.5, Alternative Dispute Resolution, was signed on April 22, 1996. This directive establishes the policy within the Department of Defense (DOD), which includes the Department of the Navy (DON); to fully use and incorporate ADR's in all of its contract disputes. The directive defines ADR as "Any procedure that parties agree to use, instead of formal

adjudication, to resolve issues in controversy, including, but not limited to, settlement negotiations, conciliation, facilitation, mediation, fact-finding, mini-trials and arbitration, or any combination thereof." These procedures will be defined and expanded upon in another section of this report.

The DOD policy for all of its components is as follows:

1. Establish and implement ADR policies and programs.
2. Make use of existing government ADR resources to avoid unnecessary expenditures of time and money.
3. Use ADR techniques as alternatives to litigation or formal administrative proceedings whenever appropriate.
4. Every dispute will be considered as a candidate for ADR.
5. Foster increased use of ADR and to identify and eliminate any barrier.

The directive also establishes working groups to help the different components with their ADR programs in monitoring the success and to implement lessons learned.

3.5 Secretary of the Navy Instruction 5800.13

Secretary of the Navy Instruction (SECNAVINST) 5800.13, Alternative Dispute Resolution, establishes the Department of the Navy's policy on ADR. This instruction follows the DODD 5145.5 policy and further defines the goals and responsibilities of each activity within the Navy. The Navy policy designates an individual with the responsibility of being the Dispute Resolution Specialist (DRS). Working for this individual is his/her Deputy who has the responsibility of the day to day operations of the Navy program. Each activity within the Navy, in my case, Naval Facilities Engineering Command (NAVFAC), has its own specialist who reports to the Navy's specialist. His/her job is to promote and coordinate the use of ADR within NAVFAC and its Engineering Field Divisions (EFD). The Navy policy further defines the DOD policy by setting the goal "To resolve disputes and conflicts at the earliest stage feasible, by the fastest and least expensive method possible and at the lowest possible organization level prior to litigation." This allows the field offices to solve its own problems before passing them on to the next higher level. They have the rapport with the contractor and the working knowledge of the contract to avoid any

dispute by solving the problem together before it gets out of hand. The policy also requires that every activity to submit a report at the end of the fiscal year on their ADR program.

3.6 Federal Acquisition Regulation Part 33

The Federal Acquisition Regulation (FAR) is the bible that all contracting officers in the Federal government must follow. It establishes the policies concerning every aspect of contracting from bidding to termination of a contractor. When a contractor or contracting officer wants to know what procedure to follow, they reference the FAR to get that guidance. The standard contract clauses come from the FAR. Appendix C is the Standard Disputes Clause, 52.233-1, which is found in all contracts. FAR Part 33 is the section that deals with Protests, Disputes, and Appeals including the use of ADR. The following are exurbs from this section:

Section 33.204 states what the government policy is to solve all disputes at the contracting officer's level before a formal claim is submitted by the contractor. It also encourages the use of ADR to the fullest extent possible.

Section 33.207 states the contractor must certify the claim if it exceeds \$100,000 or if any ADR technique is used.

Section 33.208 states that the government will pay any interest on the claim that has incurred at the rate set forth by the Secretary of the Treasury.

Section 33.210 authorizes the contracting officer to use ADR to resolve claims within the limitations of their warrants, except in the matters of fraud, or for penalties or forfeitures prescribed by statute or regulation that another federal agency is authorized to administer, settle, or determine.

Section 33.214 is the section concerning the use of ADR. It states that both parties must not be forced into using ADR and that it is voluntary. It further states the contracting officer has the authority to use ADR during any time of the claim process without effecting the time requirements. It authorizes the use of a third party neutral to help solve the dispute in question and by Public Law under 5 U.S.C. 574, all the proceedings of the ADR will be kept confidential.

4. ALTERNATIVE DISPUTE RESOLUTION TYPES

Alternative Disputes Resolution (ADR) is a means to solve a problem without resorting to litigation. Figure 2, on the following page, is guidelines set by the Department of the Navy, Office of the General Counsel, to help in deciding if your particular case should go to ADR or litigation. Some key points for using ADR include: if the dispute is over facts not issues of law; litigating would be more expensive than the recovery from the claim; both parties want a speedy resolution; and that both parties are willing to settle. A case should go to litigation if it involves fraud; issues of law; a question of policy, or there is some sort of criminal act.

GUIDELINES TO DETERMINE IF ADR SHOULD BE USED

FACTORS FOR	FACTORS AGAINST
1. The law of determinative legal issues is well settled.	1. The dispute is primary over issues of law.
2. The dispute is primary factual.	2. A decision with precedence value is needed.
3. The position of each side has merit, but its value is overstated.	3. A significant policy question is involved.
4. The cost of litigating the dispute would exceed the potential recovery.	4. A full public record of the proceedings is important.
5. No further discovery is required-or limited expedited discovery will suffice-for each side to assess its strengths and weaknesses.	5. The outcome would significantly affect non-parties.
6. Avoidance of an adverse precedent is appropriate.	6. The costs of using ADR procedure would probably be greater (time & money) than the costs of pursuing litigation.
7. A speedy resolution is desirable.	7. The case involves a willful or criminal violation of the law.
8. The case lends itself to settlement before a board or court decision.	8. The advantage of delay runs heavily in favor of one side.
9. A strong presentation will give one side or the other a more realistic attitude about the case.	9. The other side has no motivation to settle.
10. Trial preparations could be costly and protracted.	10. More time must elapse before each side's position and settlement possibilities can all be evaluated.
11. A neutral third party could help diffuse the emotion or hostility, which may inhibit an appropriate settlement of the dispute.	11. There is a need for continuing board or court supervision of one of the parties.
12. The evaluation of a neutral advisor could help break the stalemate.	12. The other side may not be forthright in its ADR presentation.
13. There is a continuous relationship among the parties.	13. Case likely to be resolved efficiently without assistance (e.g. settle, motion).
14. The parties have indicated that they want to settle.	14. Case involves fraud.
15. The case faces a hostile forum or decision-maker.	
16. We want/need to maintain control of the process.	

Figure 2 ADR Use Guidelines

If you decided that ADR is in the best interest of both parties to solve the dispute, the decision now is on what method. These methods include partnering, mini-trial, mediation, arbitration, ASBCA Bench Decision, and disputes review boards.

4.1 Partnering

Partnering is a concept that NAVFAC will use on its more complex and larger construction contracts. I will briefly describe the concept of it. Partnering is not part of the contract. It deals with the relationship between the government and the contractor in fostering a non-adversarial role of achieving the goals and the objectives of the project. The contractor can provide ideas, such as value engineering proposals, suggesting that better products or procedures could be used during the construction. If they are accepted, they can receive a percentage of the savings. Also, when problems do arise, both parties have a vested interest in solving problems as they arise in order to keep the construction moving. This is a shift in paradigms. About ten to fifteen years ago, the government had treated the contractor as the enemy. The project managers would be very hard nosed and not be

rational with the contractor, creating an "us versus them" relationship. This was extremely bad for business. Contractors tried to protect their interest because the government was not willing to work with them on common ground. Then with the implementation of Total Quality Management/Leadership, the process of contracting started to swing back to a more professional partnership. This has resulted in better quality, fewer claims, and improved relationships with the contractors. Partnering has set the new standard of contracting by creating a non-controversial relationship with common goals and objectives.

4.2 Mini-Trial

Mini-trial sounds as if you are going to a court of law to have the dispute resolved. Actually, it contains some aspects of a court trial without some of the formal procedures. If a mini-trial is going to be used both parties have to agree on the format. One feature is who will hear the case. They can present it to a one-person judge or a panel of three to act as the judge and jury. This panel of one or three is usually comprised of former judges or attorneys who have experience in the construction contract field. After this has been settled, procedures

are then discussed. This pertains to how much time each party has to present its case and to rebut the others arguments. Normally, this is done over a three-day period. The first day, one side has six hours to present their side with a two-hour rebuttal by the otherside. The next day, the roles are reversed. The last day consists of closing remarks (Hinze 280).

ASBCA's "Notice Regarding Alternative Methods of Disputes Resolution" (Notice), found in ASBCA Rules, gives guidance for the Federal government on how to use mini-trials for its disputes. The panel consists of three personnel. Both parties appoint a principal who has contracting authority along with a Board appointed neutral advisor. Both sides then present their arguments according to the agreed upon procedures. After this, both sides will enter into a negotiation with the Board advisor assisting in finding an equitable settlement. This procedure will satisfy both parties with having their day in court without all the additional expenses.

4.3 Mediation

Mediation is another form of ADR that uses a third party neutral to help in resolving the dispute. The mediator, possessing good communication and negotiation skills, listens to both sides and helps them come to a mutual agreement (Hinze 278). Rule 204 of the General Service Board of Contract Appeals (GSBCA) states "although not authorized to render a decision in the dispute, the mediator may discuss with the parties, on a confidential basis, the strengths and weaknesses of their positions." This procedure usually takes one day to settle the disagreement. The mediator will talk to each party individually throughout the day until a settlement is reached. At the end of the day if no settlement is reached, the parties will have to try to solve the problem on their own. If still no agreement is reached, the only other way to solve the problem will be another method of binding arbitration or formal litigation.

4.4 Arbitration

Arbitration is one of the oldest and most popular alternatives to litigation since the 1960's. It uses the

third party neutral as the one who will decide the dispute. Unlike mediation, the arbitrator has the authority to make a ruling, which is binding on both parties. The arbitrator is someone who is considered a subject matter expert in the area of construction. These include lawyers, contractors, claims consultants, architects, engineers, and judges. The American Arbitration Association (AAA) keeps a list of qualified arbitrators on hand to hear disputes (Hinze 276). The proceedings are similar to mediation with the arbitrator making the decision when both parties have made their case. The ruling is considered binding and can not be appealed.

4.5 ASBCA Bench Decisions

The General Counsel of the Navy released a memorandum outlining a new policy encouraging agencies within the Government to use the Bench Decision process before the ASBCA. This initiative was fostered by Naval Facilities Engineering Command (NAVFAC) Office of Counsel and the Navy Litigation Office. This new method has received the approval of the ASBCA as a new ADR technique. The policy states "Our experience indicates the bench decision process can save considerable time and avoid substantial costs by

eliminating briefing requirements and providing a speedy decision." If a contractor appeals the Contracting Officer's Final Decision, it can go to the ASBCA where the request for a Bench Decision can be made. Both parties will present their case informally to an administrative judge or panel, depending on the complexity of the case. At the end of the procedure, the judge will give an oral decision or a written decision within ten days afterwards. The ASBCA Notice on ADR Methods states:

"Both parties must agree that set decisions, rulings, and orders by the Board under this method shall be final, conclusive, not appealable, and may not be set aside, except for fraud. Also, such decisions, rulings, and orders have no precedential value."

Southern Division, Naval Facilities Engineering Command (SouthDiv) has used this method to solve some of the claims that have been levied against them. Appendix A is one of the settlement agreements from ASBCA.

4.6 Disputes Resolution Boards

A unique method to NAVFAC is the process of using Disputes Resolution Boards (DRB). Currently there are four types of DRB's that are used within NAVFAC. In a letter from

Mr. John McElhenny, NAVFAC's ADR Specialist, explains the difference between each one. They are:

1. Chief's Board. This Board reports directly to the Commander, NAVFAC. The three persons Board is comprised of senior NAVFAC acquisition and legal personnel with the Chairman being the Commander, Vice-Commander, or the Director of Acquisition. They resolve claims that are in excess of \$1,000,000 prior to the issuance of a Contracting Officer's Final Decision (COFD).
2. Modified Chief's Board. This is also a three-member board comprised of a senior contracting officer, the president of the contracting company, and a neutral advisor, usually an ASBCA judge. The dollar amount for this Board is unlimited and the hearing is heard at the Engineering Field Division (EFD)/ Engineering Field Activity (EFA) or Public Works Center (PWC). It can be used prior to or after a COFD.
3. EFD/EFA/PWC Contracts Review Board. This three person Board consists of a Level III Contracting Officer, Chief Counsel, and a senior Civil Engineer Corps (CEC) officer. The Board is convened at the EFD/EFA/PWC and resolves claims

that are within the final decision authority of the activity, prior to the COFD.

4. EFD/EFA/PWC Claims Board. This panel consists of a contracting officer, counsel, and a technical representative. It is convened every time a claim is forwarded from the field office. The Board reviews the claim to see if there is any entitlement. If there is, then the Board can convene an EFD Contracts Review Board or remand to the field for settlement.

Mr. McElhenny also states that there are some key points to NAVFAC's DRB's. They include that DRB's are voluntary, informal hearings that have no legal proceedings, and the board is comprised of officials without bias with the authority to resolve dispute. At any time, the contractor can withdraw and seek formal litigation procedures.

5. HOW TO AVOID DISPUTES

Project managers have the responsibility of administering construction contracts for the government. They are the ones who are working day to day with the contractor to ensure that the project goes as scheduled according to the plans and specifications. One form of ADR is to avoid claims and disputes before they get out of hand by trying to resolve the problems when they arise.

5.1 Principles of Conflict Resolution

The Office of the General Counsel, Department of the Navy has nine attributes that the project manager should have in order to resolve disputes. They include:

1. Think Before Reacting. Try not to have a knee jerk reaction to the conflict. Weigh all the options and facts without the emotion. Every conflict has a different solution.
2. Listen Actively. Pay attention to what the other party is saying, not only verbally, but also the body language. Repeat back what the person said to you to ensure that you understand and heard them correctly.

3. Assure a Fair Process. The contractor is entitled to a fair method of resolving the conflict. If you are not willing to give them a fair chance, then there will be more legal actions taken.
4. Attack the Problem. Both parties need to focus on what the actual problem of the conflict is. They need to remove all the emotion to get to the bottom of the issues.
5. Accept Responsibility. Everyone is responsible for his or her own actions. Both sides need to share some of the blame for the conflict, resulting in a less adversarial process and resolving the conflict quicker.
6. Use Direct Communication. What you say should be what you mean. Do not talk around the issues. Try to use "I-Messages" to relate to the other party what you want or need. Using "You-Messages" can only create more conflict by assessing blame on the other party.
7. Look for Interests. Try to come to common ground with the other party. Find what is really important to both parties.
8. Focus on the Future. The relationship of the parties has a history and a future. Understand

how it was in the past and how we are going to do business in the future, if at all.

9. Options for Mutual Gain. Focus on trying to resolve the conflict so that both parties are winners. If one side gains at the others expense, it will only create more conflict in the future.

These attributes can very useful if the project manager wants to apply them in his/her job. Using them can help eliminate all the unnecessary claims that are levied against the government, saving both parties time and money. Project managers should not try to view the contractor as the enemy, but as a professional with similar goals of providing a product or service.

5.2 Proper Documentation

Proper documentation throughout the project can avoid the problem or help understand what it is when it arises.

Because the process of resolving a dispute, either through ADR or litigation, could take several months or years before a decision is made, the facts as remembered could change. Both sides should keep good logs of correspondence, letters, photos, minutes of meetings, phone conversations, and daily inspections (Hinze 282). It can be

a lot easier to present your case to the other side or to the judge if there is clear evidence of the project. Otherwise, it will be your word against the contractors. Even if you know that you are right, without the documentation you are risking that a settlement could go the other way. It is not worth it.

5.3 Training

The Navy has many contracting classes for its project managers to attend. Some of the topics include Claims, Modifications, Contract Law, and Negotiations. It is paramount to get the proper training to understand the complexity of contracts and construction. Training does not just mean the formal classes. Subscribing to trade journals can give insight to the latest trends and court decisions. Talking to co-workers who have a lot of experience can give you first hand knowledge of the local contractors and how the policies are used. The more training a person has on contracting the better off they are in avoiding claims.

6. CURRENT ADR DATA

6.1 Naval Facilities Engineering Command

Mr. John McElhenny, NAVFAC ADR's Specialist, provided the data in Figures 3 through 9. Figure 3 represents the total number of claims received per calendar year. Figure 4 represent the number of Contracting Officer's Final Decisions (COFD) for the given Fiscal year. Unfortunately, this data is reported by two different time periods, making any correlation difficult. What it does represent is the fact that the number of claims being levied against the government has gone down 56% and the number of final decisions is down 67%. NAVFAC goal is to decrease the number of claims another 20% by 1999 to 240 and \$36 million.

Let's compare the numbers in 1995. The government received 255 claims and made 146 decisions on Time/Money claims, or 57%. However, the average number of days for a decision is about 120 days, therefore, some of the decisions are on the previous year's claim. The remaining claims are for default, termination for conveyance, defective work, and government versus contractor. Also the contractor, for lack of proof, withdraws a small percentage and others are

remanded back to the field for settlement. The remaining claims are then put in the backlog to be worked on at a later date.

Figures 5 and 6 represent Disputes Review Board actions on claims submitted. The data is for the last three years showing mixed results for this method. For this time period, only 54% of the claims were settled. More important is the dollar amount that was awarded. Of the \$17.9 million claimed, only \$5.2 million was awarded or 30% of the original claim amount.

Figures 7 and 8 are Bench Decisions at the ASBCA. This has been a very successful means of using ADR. Over the past three years it was used 73 times with settlements reached 68 times. ASBCA awarded only \$3 million of the \$42.5 million that was claim. This saved the government \$38.5 million dollars. Why is there such a huge savings? It is hard to determine what actually went on in front of the Judge because the transcriptions are kept confidential. There is only the settlement agreement which spells out who needs to pay what. Appendix A is an example of a settlement agreement. The dollar amount that was claimed in 1995 was \$31 million and only \$800,000 was awarded.

Talking to Mr. Jim Daniels, SouthDiv's ADR Specialist, shed some light on why there was so much claimed. There are some contractors, unfortunately, known as claims artists. These are the ones who will claim anything and everything and place a high dollar amount on it in the hopes of getting a big payoff. Fortunately for the government, when these types of cases go before the ASBCA Judge, the facts come out and a fair and reasonable ruling will be made.

Figure 9 represents claims that went before the EFD Claims Board and referred back down to the field office for them to settle. These are claims that did not need to be passed on and the field office should have been able to settle it at their level, in which they did.

6.2 Southern Division, Naval Facilities Engineering Command

Mr. Jim Daniels, SouthDiv's ADR Specialist, provided the data for Figures 10 and 11. Every year he submits an annual report to NAVFAC on their ADR usage. These reports are found in Appendix B. Figure 9 shows that the total number of claims against SouthDiv has gone down from 92 in 1994 to 31 in 1997. This is the same trend that is illustrated in Figure 3 depicting the decrease in NAVFAC as a whole. The number of ADR actions increased from 15% to

23% during that same time frame. Figure 11 shows the dollar amount claimed and awarded. Again, there is that big spike in 1995 that was discussed earlier. In 1996, the settlement awarded was more than what was claimed. Again, it is hard to actually know why this happened because there are no records kept, just the settlement agreement. There can be many different speculations why this occurred. One could be the actual costs were higher than what was cited in the claim or that interest had to be paid to the contractor. This could be the more likely possibility because some of these methods do take time.

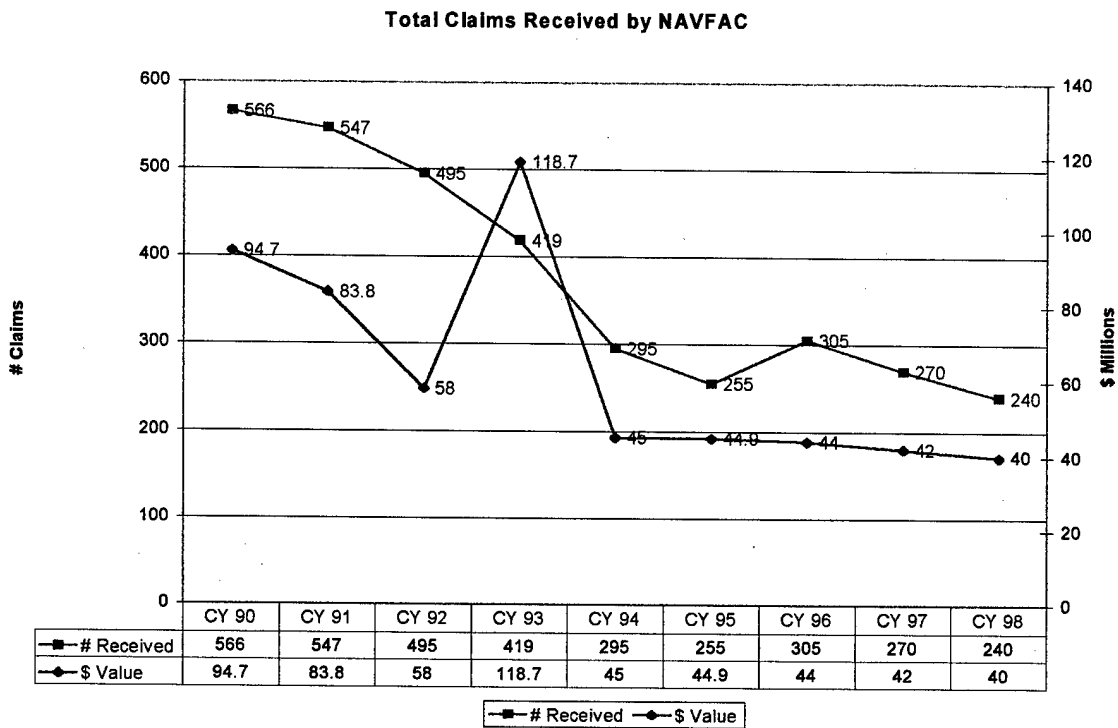


Figure 3 Total Claims Received by NAVFAC

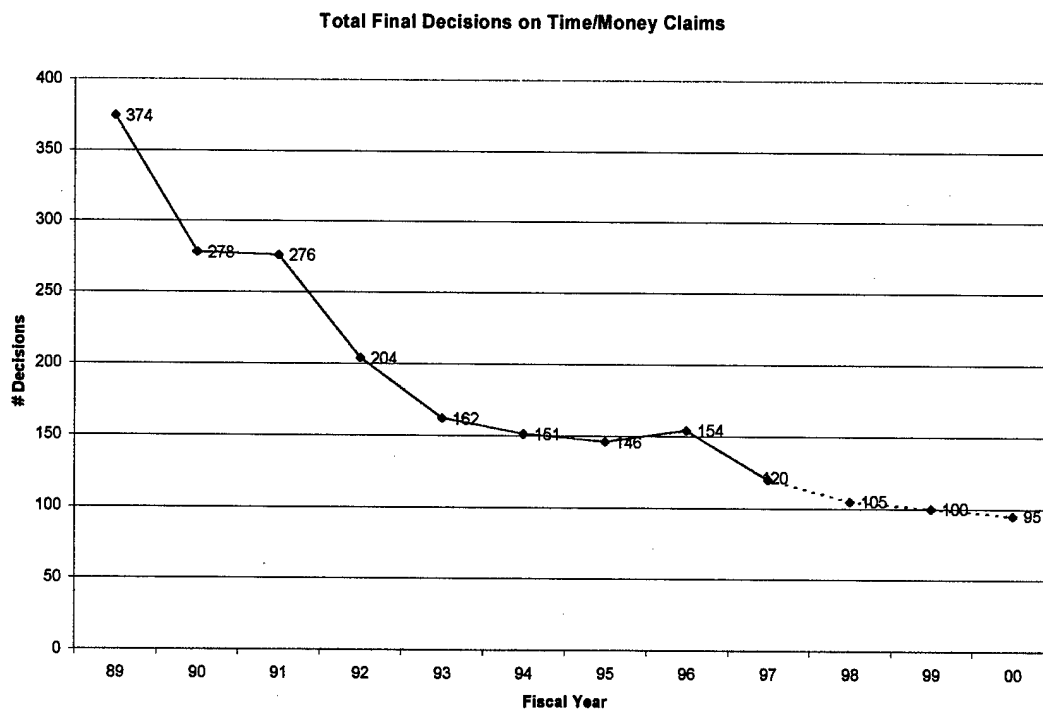


Figure 4 Total Final Decisions on Time/Money Claims

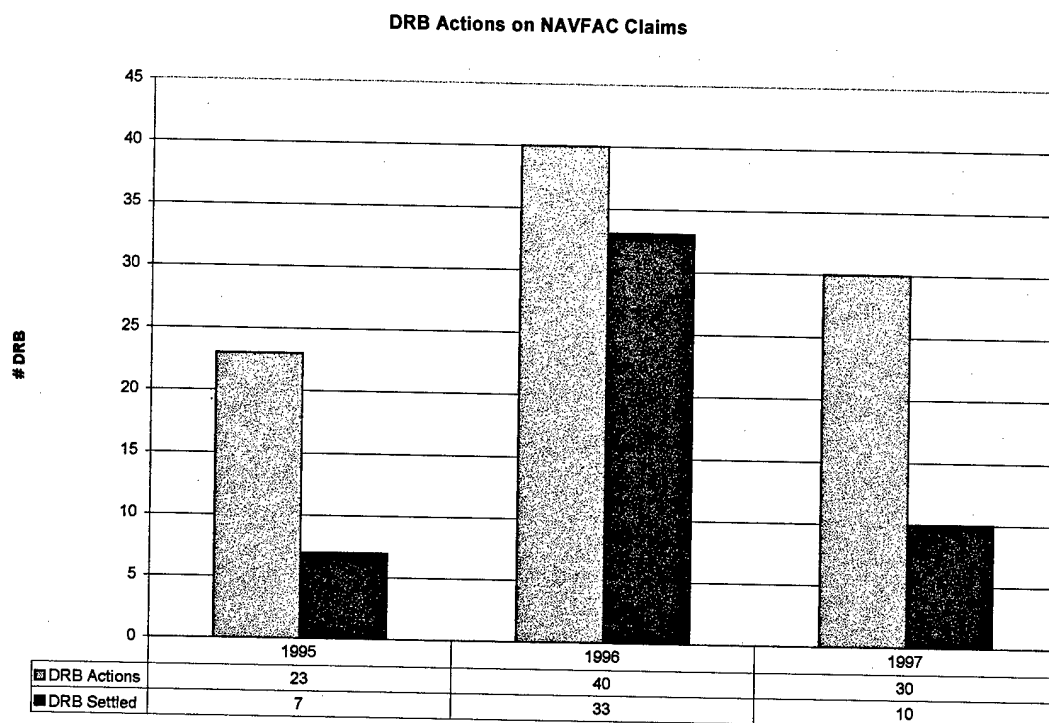


Figure 5 DRB Actions on NAVFAC Claims

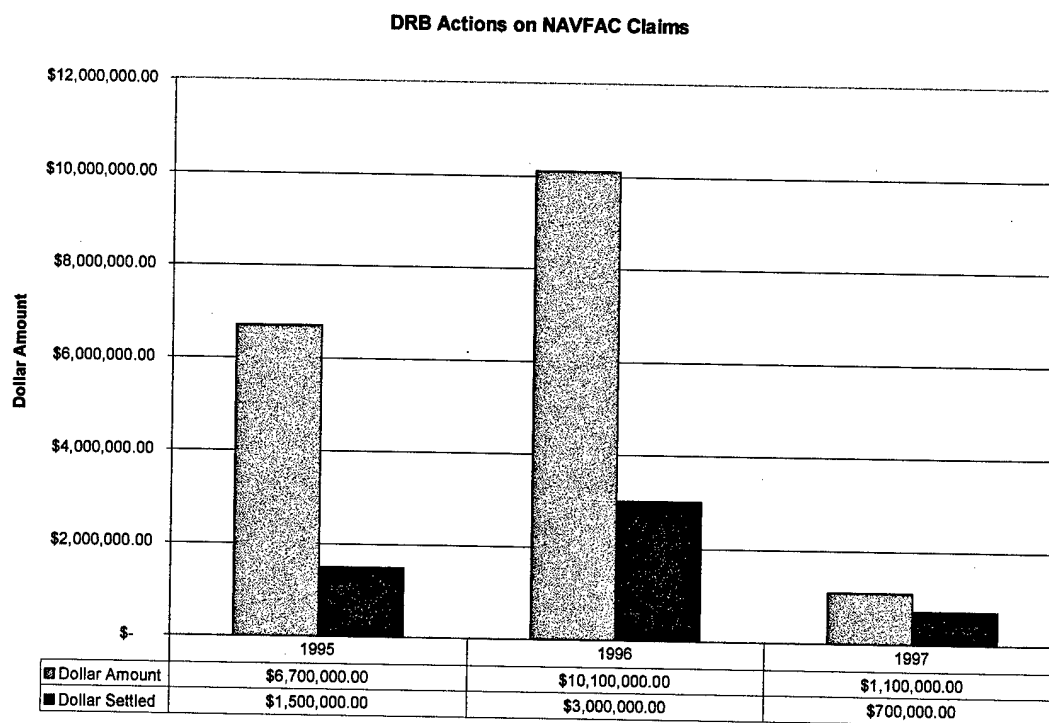


Figure 6 DRB Settlement Dollars on NAVFAC Claims

ADR Actions on NAVFAC Claims Appealed to ASBCA

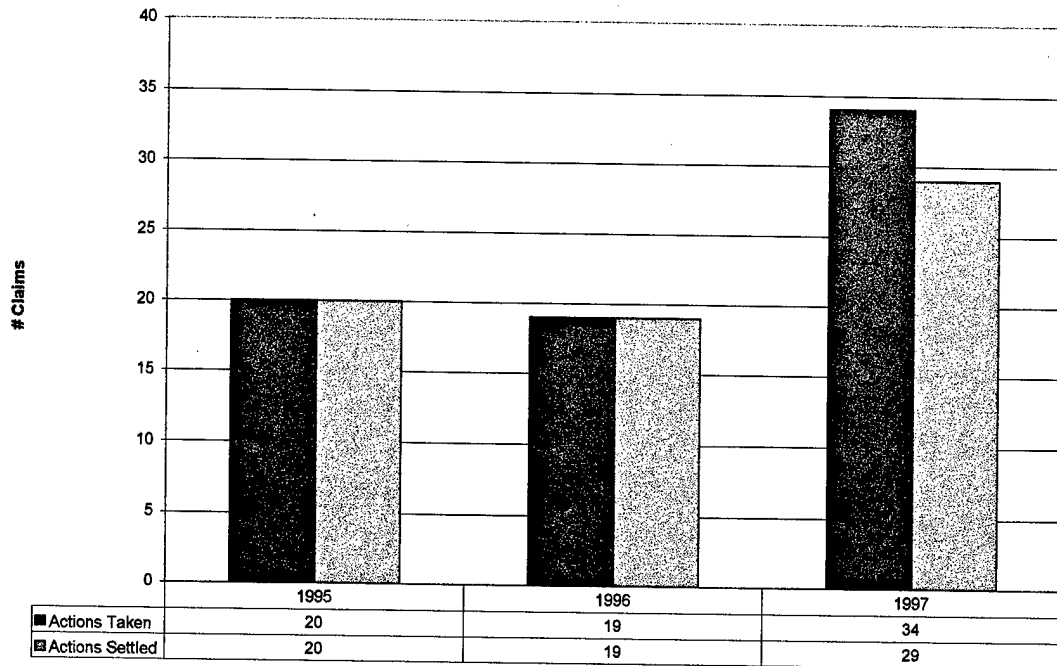


Figure 7 ADR Actions Appealed to ASBCA

ADR Actions on NAVFAC Claims Appealed to ASBCA

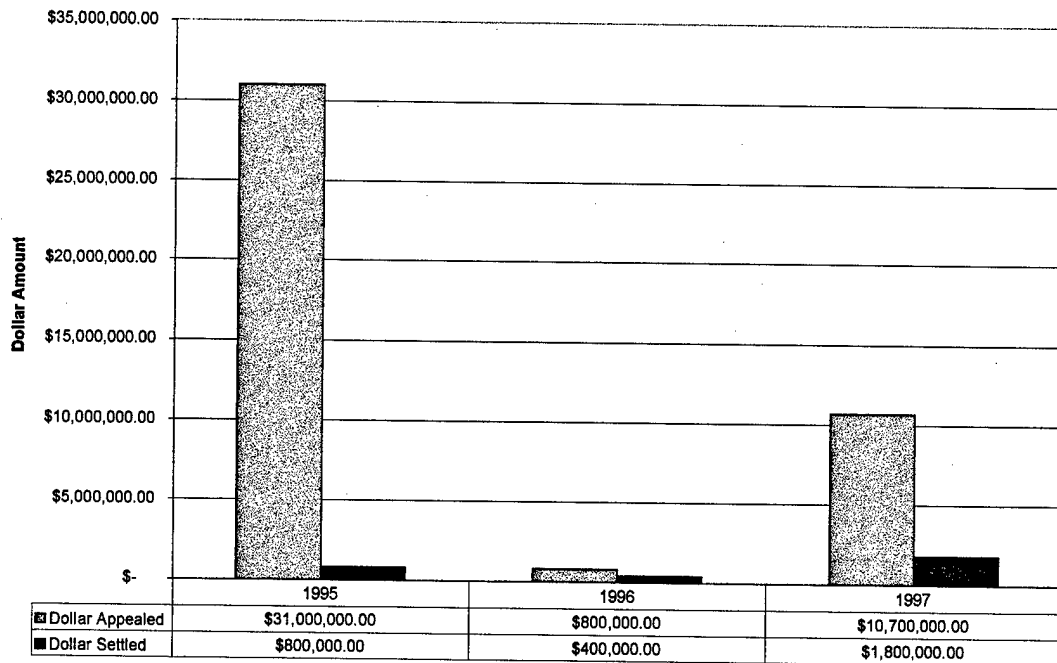


Figure 8 ADR Settlement Dollars ASBCA Appeals

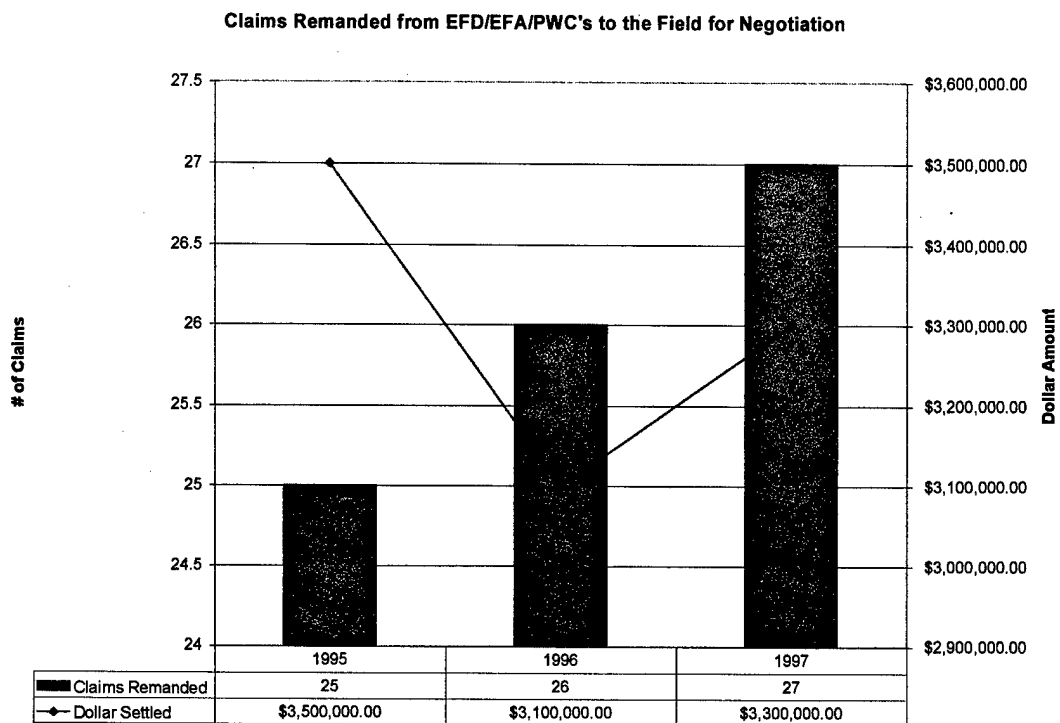


Figure 9 Claims Remanded to Field for Negotiations

SOUTHDIV NAVFACENGCOM ADR Report

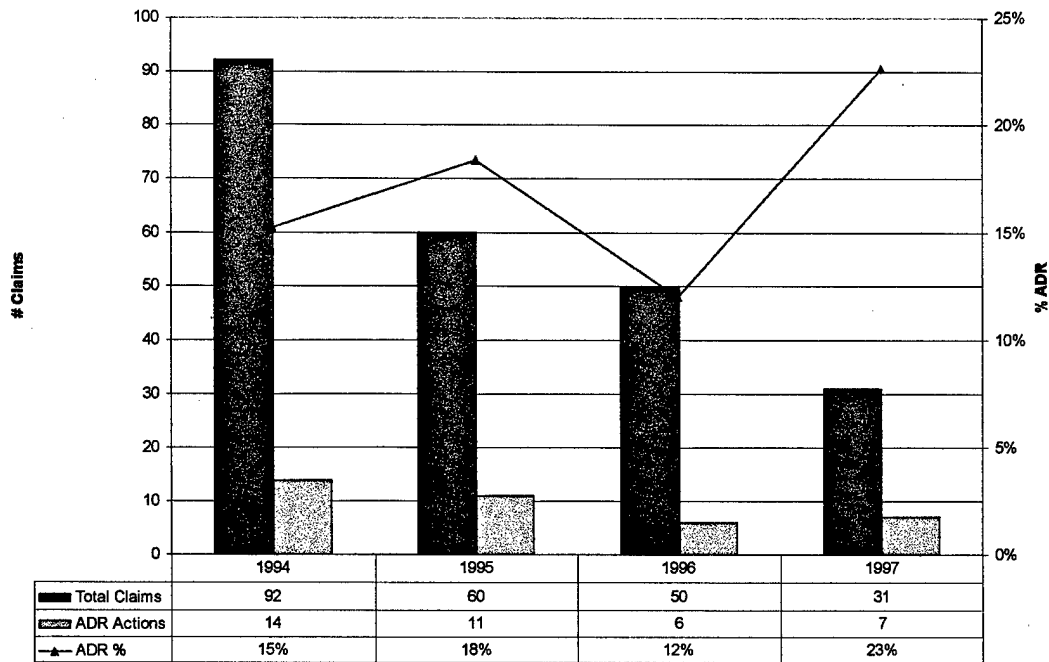


Figure 10 SOUTHDIV ADR Report

SOUTHDIV NAVFACENGCOM ADR Report

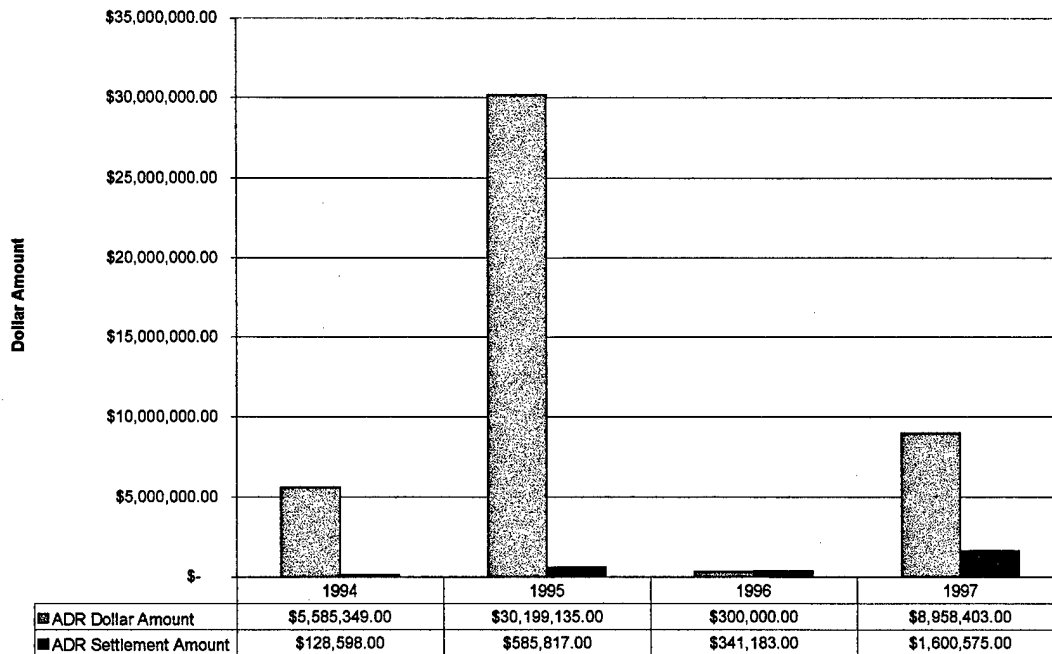


Figure 11 SOUTHDIV ADR Report - Settlement Dollars

7. CONCLUSION

Alternative Disputes Resolution is a program of many colors. Through the process of researching the Navy's ADR program, I found out that there is no set way of doing it. Every case and every dispute has to be looked at by itself to determine the facts of the claim. Mr. John McElhenny from NAVFAC likes to call ADR "Appropriate Disputes Resolution" because there is no right or wrong way of doing ADR.

There was certain data that I was looking for in particular that could not be found. The databases that are kept only contain information that is pertinent to the people that are keeping it for their required reports. Since ADR can be used at anytime in the process, the average amount of time it takes a dispute to go from the initial submittal to the time it was settled could not be calculated. With the recent government "Right Sizing" in the last 5 to 10 years, the number of people working in our contracting field offices has decreased. There are not enough people to work on the every day requirements let alone tracking information that rarely gets looked at.

The number of claims has gone down the last ten years due to many reasons. ADR is a factor but not the only one. The reason can be summed up by a "cradle to grave" way that NAVFAC is doing business.

1. The designs that we are receiving from the design firms are a lot better than they have been in the past. Better quality plans and specifications result in a better construction.
2. SouthDiv is implementing design-Build on their construction contracts. The goal is to have all the parties - owner, customer, contractor, and designer working together from the start.
3. The process of awarding contracts is changing from the "Lowest Bidder" to "Best Value." The contractor submits a proposal for the project outlining the capabilities and past experience. The proposals are then reviewed and a selection is based on who can provide the best quality product, not just the lowest price. Therefore, contractors realize that past performance is a major factor in this selection process. By doing quality work every time and submitting relevant claims when warranted, will guarantee the contractor a more favorable approval for the next contract.

4. On NAVFAC's larger construction contracts, the standard is Partnering. Because both parties have a vested interest in the process and a better working relationship, disputes are resolved before they become a claim. Using this on the average size contract would be beneficial.
5. ADR techniques being used allow the contractor to have his "day in court" without the high cost of going through litigation. Presenting the case in front of senior NAVFAC personnel sitting on an impartial board has resulted in many settlements.

The best ADR technique in resolving a claim is to avoid it altogether. In the military, you are taught to handle problems at the lowest level possible. In the contracting world, the project manager in the field office is that lowest level. They can eliminate a lot of claims by working with the contractor on the issues as they arise. The formal training they are receiving today focuses on "claim awareness and avoidance" with the emphasis on looking at the facts and solve the problem without resorting to a claim. This is the best alternative to resolving disputes: solve them before they become one.

GLOSSARY

AAA - American Arbitration Association
ADR - Alternative Disputes Resolution
ADRA - Administrative Disputes Resolution Act of 1990/1996
ASBCA - Armed Services Board of Contract Appeals
CDA - Contract Disputes Act of 1976
CEC - Civil Engineer Corps
CFC - Court of Federal Claims
COFD - Contracting Officer's Final Decision
DOD - Department of Defense
DODD - Department of Defense Directive
DON - Department of the Navy
DRB - Disputes Review Board
DRS - Disputes Resolution Specialist
EFA - Engineering Field Activity
EFD - Engineering Field Division
FAR - Federal Acquisition Regulation
GSBCA - General Services Board of Contract Appeals
NAVFAC - Naval Facilities Engineering Command
OGC - Office of the General Counsel
PWC - Public Works Center
SECNAVINST - Secretary of the Navy Instruction
SOUTHDIV - Southern Division, Naval Facilities Engineering
 Command

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Smith, Currie & Hancock. Common Sense Construction Law. New York: John Wiley & Sons, Inc, 1997.

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United States. Department of the Navy, Office of the General Counsel. Internet site: <http://www.ogc.secnave.hq.navy.mil>.

United States. Department of the Navy. Secretary of the Navy Instruction (SECNAVINST) 5800.13 "Alternative Disputes Resolution (ADR)." December 11, 1996.

United States. Department of the Navy. Southern Division, Naval Facilities Engineering Command Instruction 4365.2 "Disputes Review Board." July 12, 1993.

United States. Executive Order #12979 "Agency Procurement Protests." October 26, 1995.

United States. Executive Order #12988 "Civil Justice Reform." February 5, 1996.

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United States. General Counsel of the Navy. Memorandum for the Assistant General Counsel (RD&A) counsel to the Commandant of the Marine Corps, Command Counsels, "Policy on the use of Bench Decisions before the ASBCA." Washington: March 31, 1997.

United States. Rules of the Armed Services Board of Contract Appeals. Washington: July 1, 1997.

United States. Rules of the General Services Board of Contract Appeals. Washington: June 26, 1998.

United States. The White House. Office of the Press Secretary, Memorandum for Heads of Executive Departments & Agencies. Palo Alto, CA: May 1, 1998.

APPENDIX A - SETTLEMENT AGREEMENT ASBCA No. 49529

The following is an actual settlement agreement from a SouthDiv, NAVFAC claim that was resolved using the ASBCA Bench Decision method.

SETTLEMENT AGREEMENT

ASBCA No. 49529
Appeal of Harvey Honore Construction Co., Inc.
Under Contract No. N62467-88-C-0133.

WITNESSETH THAT:

This Settlement Agreement is made between the United States of America, acting through the Department of the Navy, Naval Facilities Engineering Command (hereinafter the "Government"), and Harvey Honore Construction Company, Inc. (hereinafter the "Contractor").

WHEREAS the Contractor and the Government entered into Contract N62467-88-C-0133 (hereinafter the "Contract"); and

WHEREAS on 19 September 1994, the Contractor submitted to the Contracting Officer a certified claim in the amount of \$552,045.09 plus Contract Disputes Act interest alleging, among other things, delays which resulted in additional costs for itself and its subcontractors (hereinafter the "Claim"); and

WHEREAS the Contractor subsequently appealed the Contracting Officer's Final Decision to the Armed Services Board of Contract Appeals (hereinafter the "Appeal"); and

WHEREAS the Appeal was docketed as ASBCA No. 49529; and

WHEREAS the parties have negotiated and given full consideration to all matters relating to a compromise and settlement of the Claim; and

WHEREAS, in the interest of resolving all matters relating to the Claim, and under the sound policy of law favoring the settlement of disputes, the parties have agreed upon a mutually acceptable settlement of the claim brought under ASBCA No. 49529;

NOW, THEREFORE, in consideration of the mutual promises and agreements of the parties hereto, each to the other, and other valuable consideration, the parties, intending to be legally bound, hereby agree as follows:

1. This agreement is expressly contingent upon the Board's acceptance and incorporation into a Board decision.
2. The parties hereby agree that within 10 calendar days of execution of this Settlement Agreement they will jointly move that the Board sustain the Appeal in the amount of \$225,000.00, which amount is in full and final settlement of and is inclusive of all claims, compensatory damages, exemplary damages, and all other costs that the Contractor, its successors, sureties, assigns, vendors, suppliers, and subcontractors

might claim in connection with the Claim brought under ASBCA No. 49529. The parties further agree that they will jointly move that the Board expressly incorporate this agreement into the Board's decision sustaining the Appeal.

3. That in the event the Contractor does not receive payment from the Judgment Fund in the amount of \$225,000.00 on or before 12 June 1997, then interest will begin to run on any balance due and owing on 13 June 1997 at the rates specified by the Department of the Treasury for claims brought under the Contract Disputes Act of 1978.
4. This agreement is intended to constitute full and final disposition of all matters under the Claim brought under ASBCA No. 49529, and a full release and accord and satisfaction as to any and all claims, demands or causes of action, actual or constructive, legal, equitable, contractual, or administrative including attorney's fees and costs, and interest, that either party has or may have against the other arising from or relating to the Claim.
5. The parties hereby waive all rights to appeal, to seek reconsideration or to otherwise challenge the terms of a Board decision sustaining this appeal.
6. This agreement is for the sole purpose of settling the Claim brought under ASBCA No. 49529 and may not be introduced into evidence by either party in any proceeding or dispute, whether judicial or administrative in nature, except as is necessary to implement the terms of this Agreement. Further, this Agreement is not an admission or a concession by either party.
7. Within ten days after the issuance of a Board decision incorporating this Settlement Agreement, the Contractor agrees to execute and cause to be filed with the ASBCA a request that appellant's ASBCA appeal (No. 49529) be dismissed with prejudice.
8. The Contractor agrees to hold the Government harmless for any claim arising between it and any other party over the proceeds from this settlement.
9. The Government and appellant agree to execute any such further papers or documents as shall be necessary and proper in order to fulfill the terms and conditions of this Settlement Agreement.
10. This Settlement Agreement may not be amended or modified in any manner except in a writing signed by authorized representatives of both parties.
11. All prior agreements, representations, promises, negotiations, proposals, assurances and understandings with regard to the subject matter of this Settlement Agreement are integrated in and superseded by the Settlement Agreement.

12. Except as provided herein, all terms and conditions of the Contract, if any terms and conditions are presently in effect, remain unchanged and in full force and effect.
13. The \$225,000 includes settlement of all claims, including the claim of the subcontractor MCC for which the Navy audit questioned all of the costs.
14. Each individual executing this Agreement is authorized to execute for and on behalf of the parties for whom he signs and does so as his free and voluntary act, recognizing this agreement sets forth the entire settlement between the parties.

WHEREFORE, the parties have executed this instrument on the dates hereinafter set forth.

FOR THE GOVERNMENT

By:

M. F. Shreve
(Signature)

Mervin F. Shreve
(Typed Name)

Contracting Officer
(Title)

May 21, 1997
(Date)

FOR THE CONTRACTOR

Dexter J. Honore
(Signature)

Dexter J. Honore
(Typed Name)

Vice President
(Title)

May 16, 1997
(Date)

APPENDIX B - SOUTHDIV ANNUAL ADR REPORTS 1994-1997

The following are the Annual Reports that SouthDiv, NAVFAC sends to NAVFAC Headquarters every year.

SOUTHDIV ANNUAL ALTERNATIVE DISPUTES RESOLUTION (ADR) REPORT FOR THE
PERIOD

01 JANUARY 1997 - 31 DECEMBER 1997

(a)	Number of appeals docketed under \$25,000 and \$50,000 during calendar year.	= 0
	1/1/96 - 3/31/96	= _____
	4/1/96 - 6/31/96	= _____
	7/1/96 - 9/30/96	= _____
	10/1/96 - 12/31/96	= _____
(b)	Number of appeals docketed between \$25,000 and \$50,000 during calendar year.	= 0
	1/1/96 - 3/31/96	= _____
	4/1/96 - 6/31/96	= _____
	7/1/96 - 9/30/96	= _____
	10/1/96 - 12/31/96	= _____
(c)	Number offered	= 7
(d)	Number accepted	= 7
(e)	Number of ADR actions completed	= 7
(f)	Number of ADR actions continued to following quarter	= 0
(g)	Total value of appeals	= \$ 8,958,403
(h)	Value of entitlement determined by ADR actions	= \$ 1,600,575
(i)	Other information regarding past or current ADR actions:	= N/A

Enclosure (2)

SOUTHDIV ANNUAL ALTERNATIVE DISPUTES RESOLUTION (ADR) REPORT FOR THE
PERIOD









01 JANUARY 1996 - 31 DECEMBER 1996

(a)	Number of appeals docketed under \$25,000 and \$50,000 during calendar year.	= 11
	1/1/96 - 3/31/96	= _____
	4/1/96 - 6/31/96	= _____
	7/1/96 - 9/30/96	= _____
	10/1/96 - 12/31/96	= _____
(b)	Number of appeals docketed between \$25,000 and \$50,000 during calendar year.	= 3
	1/1/96 - 3/31/96	= _____
	4/1/96 - 6/31/96	= _____
	7/1/96 - 9/30/96	= _____
	10/1/96 - 12/31/96	= _____
(c)	Number offered	= 6
(d)	Number accepted	= 6
(e)	Number of ADR actions completed	= 6
(f)	Number of ADR actions continued to following quarter	= 0
(g)	Total value of appeals	= \$ 300,000
(h)	Value of entitlement determined by ADR actions	= \$ 341,183
(i)	Other information regarding past or current ADR actions:	= N/A

Enclosure (3)

SOUTHDIV ANNUAL ALTERNATIVE DISPUTES RESOLUTION (ADR) REPORT FOR THE
PERIOD

01 JANUARY 1995 - 31 DECEMBER 1995

(a)	Number of appeals docketed under \$25,000 and \$50,000 during calendar year.	=	5
	1/1/95 - 3/31/95	=	
	4/1/95 - 6/31/95	=	
	7/1/95 - 9/30/95	=	
	10/1/95 - 12/31/95	=	
(b)	Number of appeals docketed between \$25,000 and \$50,000 during calendar year.	=	2
	1/1/95 - 3/31/95	=	
	4/1/95 - 6/31/95	=	
	7/1/95 - 9/30/95	=	
	10/1/95 - 12/31/95	=	
(c)	Number offered	=	18
(d)	Number accepted	=	18
(e)	Number of ADR actions completed	=	11
(f)	Number of ADR actions continued to following quarter	=	7
(g)	Total value of appeals	=	\$30,199,135
(h)	Value of entitlement determined by ADR actions	=	\$ 585,817
(i)	Other information regarding past or current ADR actions:	=	N/A

SOUTHDIV ANNUAL ALTERNATIVE DISPUTES RESOLUTION REPORT FOR THE PERIOD

01 JANUARY 1994 - 31 DECEMBER 1994

(a)	Number of appeals docketed under \$25,000 and \$50,000 during calendar year.	= <u>8</u>
*	1/1/93 - 3/31/93	= <u>--</u>
*	4/1/93 - 6/30/93	= <u>--</u>
*	7/1/93 - 9/30/93	= <u>--</u>
*	10/1/93 - 12/31/93	= <u>--</u>
(b)	Number of appeals docketed between \$25,000 and \$50,000 during calendar year.	= <u>10</u>
*	1/1/93 - 3/31/93	= <u>--</u>
*	4/1/93 - 6/30/93	= <u>--</u>
*	7/1/93 - 9/30/93	= <u>--</u>
*	10/1/93 - 12/31/93	= <u>--</u>
(c)	Number offered	= <u>14</u>
(d)	Number accepted	= <u>14</u>
(e)	Number of ADR actions completed	= <u>14</u>
(f)	Number of ADR actions continued to following quarter	= <u>-0-</u>
(g)	Total value of appeals	= <u>\$ 5,585,349</u>
(h)	Value of entitlement determined by ADR actions	= <u>\$ 128,598</u>
(i)	Other information regarding past or current ADR actions:	= <u>N/A</u>

* Records are not kept by quarter.

APPENDIX C - CONTRACT DISPUTES CLAUSE FAR 52.233-1

The following is the standard clause in all government contracts that outline the requirements for submitting a claim under a dispute.

52.233-1 Disputes.

As prescribed in 33.215, insert the following clause:

Disputes (Oct 1995)

(a) This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613).

(b) Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved under this clause.

(c) "Claim," as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. A claim arising under a contract, unlike a claim relating to that contract, is a claim that can be resolved under a contract clause that provides for the relief sought by the claimant. However, a written demand or written assertion by the Contractor seeking the payment of money exceeding \$100,000 is not a claim under the Act until certified as required by subparagraph (d)(2) of this clause. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under the Act. The submission may be converted to a claim under the Act, by complying with the submission and certification requirements of this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

(d)(1) A claim by the Contractor shall be made in writing and, unless otherwise stated in this contract, submitted within 6 years after accrual of the claim to the Contracting Officer for a written decision. A claim by the Government against the Contractor shall be subject to a written decision by the Contracting Officer.

(2)(i) Contractors shall provide the certification specified in subparagraph (d)(2)(iii) of this clause when submitting any claim--

(A) Exceeding \$100,000; or

(B) Regardless of the amount claimed, when using--

(1) Arbitration conducted pursuant to 5 U.S.C. 575-580; or

(2) Any other alternative means of dispute resolution (ADR) technique that the agency elects to handle in accordance with the Administrative Dispute Resolution Act (ADRA).

(ii) The certification requirement does not apply to issues in controversy that have not been submitted as all or part of a claim.

(iii) The certification shall state as follows: "I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the Contractor."

(3) The certification may be executed by any person duly authorized to bind the Contractor with respect to the claim.

(e) For Contractor claims of \$100,000 or less, the Contracting Officer must, if requested in writing by the Contractor, render a decision within 60 days of the request. For Contractor-certified claims over \$100,000, the Contracting Officer must, within 60 days, decide the claim or notify the Contractor of the date by which the decision will be made.

(f) The Contracting Officer's decision shall be final unless the Contractor appeals or files a suit as provided in the Act.

(g) If the claim by the Contractor is submitted to the Contracting Officer or a claim by the Government is presented to the Contractor, the parties, by mutual consent, may agree to use ADR. If the Contractor refuses an offer for alternative disputes resolution, the Contractor shall inform the Contracting Officer, in writing, of the Contractor's specific reasons for rejecting the request. When using arbitration conducted pursuant to 5 U.S.C. 575-580, or when using any other ADR technique that the agency elects to handle in accordance with the ADRA, any claim, regardless of amount, shall be accompanied by the certification described in subparagraph (d)(2)(iii) of this clause, and executed in accordance with subparagraph (d)(3) of this clause.

(h) The Government shall pay interest on the amount found due and unpaid from (1) the date that the Contracting Officer receives the claim (certified, if required); or (2) the date that payment otherwise would be due, if that date is later, until the date of payment. With regard to claims having defective certifications, as defined in FAR 33.201, interest shall be paid from the date that the Contracting Officer initially receives the claim. Simple interest on claims shall be paid at the rate, fixed by the Secretary of the Treasury as provided in the Act, which is applicable to the period during which the Contracting Officer receives the claim and then at the rate applicable for each 6-month period as fixed by the Treasury Secretary during the pendency of the claim.

(i) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer.

(End of clause)

Alternate I (Dec 1991). If it is determined under agency procedures, that continued performance is necessary pending resolution of any claim arising under or relating to the contract, substitute the following paragraph (i) for the paragraph (i) of the basic clause:

(i) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under or relating to the contract, and comply with any decision of the Contracting Officer.